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March 14, 2000

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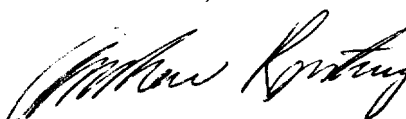
Re: *Ex Parte* Presentation - In the Matter of:
Establishment of a Class A Television Service
(MM Docket Nos. 00-10, 99-292; RM-9260)

Dear Ms. Salas:

This is to advise the FCC that representatives of The WB Television Network, Pappas Telecasting Companies, and Davis Television Clarksburg, L.L.C. (and its affiliated entities) will be making an oral presentation to the offices of Chairman Kennard and Commissioners Ness, Furchtgott-Roth, and Tristani on Wednesday, March 15, 2000. In accordance with the Commission's *Ex Parte* rules, enclosed herewith are copies of four (4) memorandums (one addressed to each of the above-referenced Commissioners' offices) which contains a summary of the substance of each presentation.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting
Counsel for The WB Television Network
and Pappas Telecasting Companies

Enclosures

cc (w/ encls.): Mr. Keith Larson (FCC) (by hand)

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MEMORANDUM

TO: Thomas Power, Esquire

CC: Office of the Secretary
Mr. Keith Larson (Mass Media Bureau)

FROM: Andrew S. Kersting 

DATE: March 14, 2000

RE: In the Matter of: Establishment of a Class A Television Service
(MM Docket Nos. 00-10, 99-292; RM-9260)

Set forth below is a brief outline of the matters that representatives of The WB Television Network, Pappas Telecasting Companies, and Davis Television intend to discuss with you during our scheduled meeting on Wednesday, March 15, 2000. A list of those persons scheduled to attend the meeting is attached. As indicated above, a copy of this memorandum has been provided to the Office of the Secretary and the Mass Media Bureau.

**Proposal to Require Class A LPTV Applications to Protect Pending Applications
and Allotment Rulemaking Petitions for New NTSC Stations**

I. Introduction.

- A. Issue: Whether the Community Broadcasters Protection Act of 1999 (the "CBPA") requires pending applications and allotment rulemaking petitions proposing new full-service television stations to protect subsequently-filed Class A LPTV applications.

- B. Relevant Statutory Provision: Section 336(f)(7)(A) of the Communications Act (as amended by the CBPA) provides that the FCC may not grant a Class A license unless the applicant demonstrates, *inter alia*, that the proposed Class A station will not cause interference to the predicted Grade B contour “of any television station transmitting in analog format”
 - C. NPRM’s Proposal: Interpret §336(f)(7)(A) to require Class A applications to protect only *authorized* NTSC stations, *i.e.*, those full-power TV stations holding either a license or a construction permit.
 - D. Parties’ Proposed Interpretation: Class A applications also should be required to protect all pending applications and allotment rulemaking petitions proposing new full-power stations.
- II. Protecting Pending NTSC Proposals Would Be Consistent With the FCC’s Statements in the DTV Proceeding and Would Otherwise Serve the Public Interest.
- A. Background. The applications and allotment rulemaking petitions currently pending before the FCC could result in approximately 250 new NTSC stations, many of which would be in underserved markets (*i.e.*, fewer than five commercial stations). The FCC has repeatedly stated that it would attempt to accommodate these pending applications and allotment rulemaking petitions for new NTSC stations, including those involving channels 60-69 and “freeze” waiver applications. In enacting the CBPA, Congress recognized that LPTV stations “serve a much smaller geographic region than do full-service stations,” and, thus, do not constitute a satisfactory substitute for full-power stations.
 - B. July 1987 Television Filing “Freeze”: Affording Class A applications protection from pending applications and rulemaking petitions for new NTSC stations would be inequitable due to the disparate treatment they received during the DTV filing freeze.
 - C. The NPRM’s Proposed Interpretation of Section 336(f)(7)(A) Would Be Inconsistent With Section 307(b) of the Act.
- III. Legal Authority.
- A. The NPRM’s Proposed Interpretation of Section 336(f)(7)(A) is Inconsistent With the Principles of Statutory Construction.
 - 1. The phrase “transmitting in analog format” is ambiguous, and may be best read as a short-hand phrase for describing the entire NTSC universe. In the absence of a clearly expressed Congressional intent to overturn the

FCC's existing and longstanding regulatory scheme through "clear, unmistakable and unarguable language," the existing scheme providing protection to primary service applications must stand.

- B. The NPRM's Proposed Interpretation is Inconsistent with Section 336(f)(7)(B) of the CBPA.
 - 1. Section 336(f)(7)(B) requires Class A applications to protect authorized LPTV and TV translator applications, as well as pending applications for such facilities. The CBPA needed to specifically protect such secondary service applications because they otherwise have none.
 - 2. It would be inconsistent with the FCC's longstanding regulatory scheme to protect pending applications for LPTV and TV translators stations -- including those which are not eligible for a Class A license and will continue to be secondary services -- and fail to protect pending applications and rulemaking petitions for new NTSC stations, which have always been a primary service.
 - C. The NPRM's Proposed Interpretation Could Result in a Violation of the Due Process Clause of the Fifth Amendment.
 - D. The NPRM's Proposed Interpretation is Not Likely to Withstand First Amendment Analysis.
 - E. The CBPA contemplated a small number of Class A stations. Therefore, the Class A criteria should be strictly construed.
- IV. The Initial Comments of the Community Broadcasters Association ("CBA") Recognized that the FCC Must Protect Certain Pending NTSC Applications.
- A. An overwhelming number of comments supported the protection of pending NTSC proposals. In its initial rulemaking comments, even the CBA recognized that the FCC must protect certain pending applications for NTSC stations, including "post-auction applications, applications proposed for grant in pending settlements, and any singleton applications that are cut off from further filings." See CBA Comments, p. 9.
 - B. In its reply comments, the CBA attempted to reverse course and argued that Class A applications should be required to protect only authorized full-power stations (consistent with the NPRM's proposal).

SCHEDULED ATTENDEES

Cathy Nolan, Vice President - Law & Public Policy, Time Warner.

Howard Shrier, Executive Vice President & Chief Operating Officer, Pappas Telecasting Companies.

Dennis P. Corbett, Esquire, on behalf of Davis Television Clarksburg, L.L.C. and its affiliated entities.

Vincent J. Curtis, Esquire and Andrew S. Kersting, Esquire on behalf of The WB Television Network and Pappas Telecasting Companies.

(John D. Maatta, Senior Vice President/General Counsel, The WB Television Network, who previously was scheduled to attend the meeting, will be unable to come to Washington as scheduled.)